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AIR POLLUTION

'I assume your clients are happy as can be' — judge

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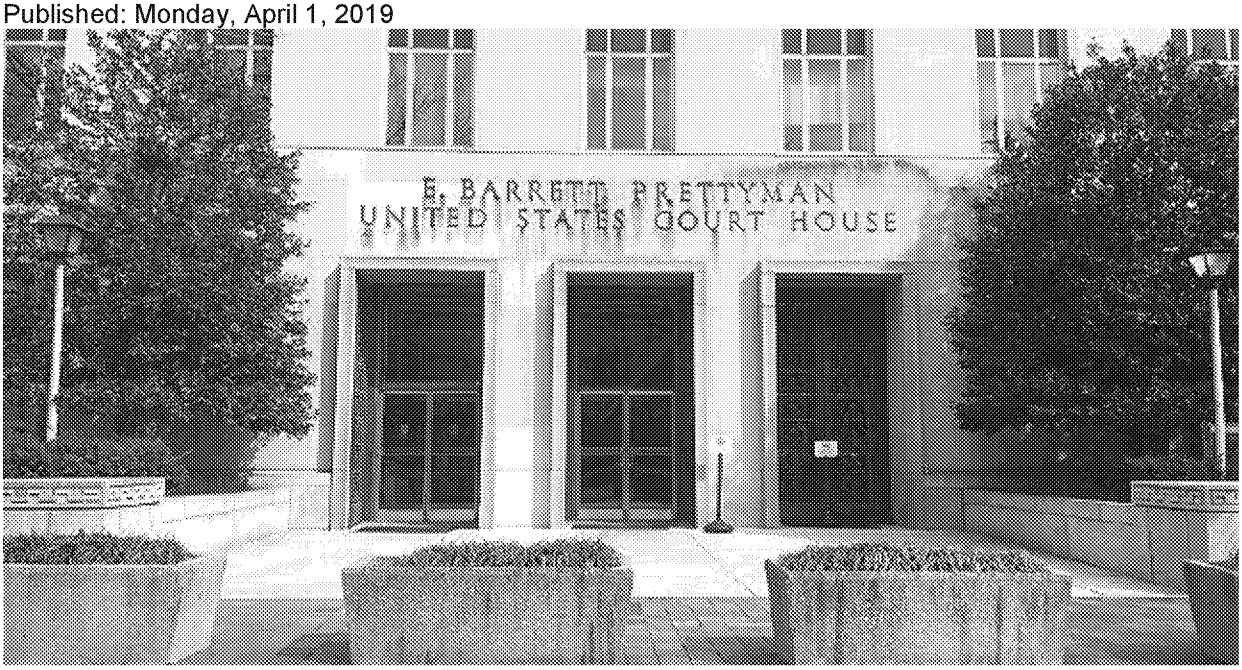

The E. Barrett Prettyman building in Washington, D.C., home to the U.S. Court of Appeals for the District of Columbia Circuit. Ellen M. Gilmer/E&E News

Federal judges grappled with thorny procedural issues while weighing the fate of the Trump administration's decision to scrap a Clinton-era air pollution policy known as "once in, always in."

The U.S. Court of Appeals for the District of Columbia Circuit spent much of today's oral arguments — which lasted an hour longer than scheduled — puzzling over whether the Trump administration's 2018 decision to end a long-standing Clean Air Act interpretation was really final.

At issue is EPA air chief Bill Wehrum's reversal of a 1995 policy that required sources that reached an air toxics emissions threshold triggering strict "maximum achievable control technology" standards to continue meeting those standards even after emissions later fell below the line.

Wehrum reversed that policy in a memo last January, and EPA has since launched a full notice-and-comment rulemaking process to cement the change.

Senior Judge Laurence Silberman questioned why the court should even consider a legal challenge from California and environmental groups that says the policy change violates both the Clean Air Act and procedural requirements for EPA regulatory changes. Justice Department lawyer Eric Grant, representing EPA, argued the litigation is premature.

"This case is not ripe," Grant said, explaining that Wehrum's memo does not qualify as a final agency action subject to judicial review. He added that the interpretation in the memo does not foreclose other outcomes in the rulemaking process. EPA wants public input to decide how to move forward.

That process has gone much more slowly than predicted, however; the agency sent the proposed rule to the White House Office of Management and Budget just over a month ago (*Greenwire*, Feb. 26). Grant said he expects a draft to be released for public review in June.

Sierra Club attorney Sanjay Narayan and California Deputy Attorney General Kavita Lesser contended during today's arguments that the Wehrum memo deserves review now, regardless of the agency's other moves on the "once in" policy.

"But in this case, your honor, the memo on its face says that it is final and effective," Narayan said in response to questioning from Silberman, a George W. Bush appointee.

Judge Judith Rogers seized on that point in an exchange with Hunton Andrews Kurth LLP attorney Shannon Broome, representing industry parties.

"I assume your clients are happy as can be," the Clinton appointee said, suggesting that the policy change could, in fact, represent a final action that permit holders were relying on when making operational decisions.

Broome maintained the Wehrum memo did not have a binding effect.

Environmentalists say Wehrum's memo is a problem for two reasons: The policy change allows operators to skirt Clean Air Act goals to reduce levels of arsenic, benzene and other hazardous pollutants in the air, and the change should have been adopted through official rulemaking procedures.

"This loophole puts communities across our country at risk of increased exposure to benzene and other dangerous or cancer-causing pollutants," Environmental Defense Fund lawyer Tomás Carbonell said in a statement today. "The loophole was created unlawfully and violates the Clean Air Act. It should be closed immediately."

Silberman remained skeptical during today's arguments, noting that the Clinton-era policy was also announced through a guidance document, not as a formal regulation. How can the court order that 1995 interpretation to be reactivated if it suffered from the same procedural flaws the environmentalists are raising for the new memo, he asked.

The petitioners responded that the Clinton policy was in place for so long without being challenged in court that it became a de facto regulation — an explanation Silberman ridiculed as a "chutzpah argument."

Judge Robert Wilkins, an Obama appointee, also sat on the panel. A decision is expected in the next few months.